No. 406

In the Supreme Court of the United States

OCTOBER TERM, 1958

FEDERAL TRADE COMMISSION, PETITIONER

v.

SIMPLICITY PATTERN CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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INDEX

CITATIONS

Cases:

498747—59——1

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OPINIONS BELOW

The opinion of the court of appeals (R. 327–344) is reported in 258 F. 2d 673. The opinion of the Federal Trade Commission (R. 27–31) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1958 (R. 345). The time for filing a petition for a writ of certiorari was extended by Mr. Chief Justice Warren on August 28, 1958, to September 26, 1958 (R. 346). The petition was filed on September 26, 1958, and was granted on November 24, 1958 (R. 347; 358 U.S. 897). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the defense of "cost justification," which § 2(a) of the Clayton Act expressly provides is a defense to a charge of price discrimination under that section, is also available as a defense to a charge of discrimination in furnishing of services or facilities in violation of § 2(e) of the Act.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, is set forth in the appendix, *infra*, pp. 25–27.

STATEMENT

The Federal Trade Commission initiated this proceeding in June 1954 by issuing a complaint against respondent charging, in Count I, use of unfair methods of competition in violation of the Federal Trade Commission Act, and, in Count II, discrimination in favor of its "larger customers" by furnishing to them services or facilities not accorded on proportionally equal terms to its "smaller customers", in violation of § 2(e) of the Clayton Act (R. 2–10). Since the Commission subsequently dismissed Count I, the case now concerns only the order of the Commission based on the Clayton Act charge.

1. Respondent's business is the manufacture and sale of dress patterns, which are used for making women's and children's dresses in the home (R. 13). It sells its patterns to department stores, to five and ten cent stores (here called ten cent stores), and to relatively small stores engaged in sale of fabrics (here called

fabric stores) (R. 212–3). Four other companies sell dress patterns to retailers.[1] On a unit basis, respondent's sales exceed the combined sales of its competitors; on a dollar basis, they are about one-third of the industry total (R. 204–5, 233, 312).[2] It sells in the United States to about 17,200 retail outlets, which represent about 12,300 customers (R. 211).

Respondent's patterns are sold at retail at 25¢, 35¢, and 50¢, and are sold to retailers at 60% of the labeled retail price (R. 21). Respondent maintains about 600 current patterns, issuing some 40 new designs each month (R. 199, 236). Three times a year it sends its customers a list of its discarded designs and gives the dealer a credit for the discarded designs which the dealer has on hand (R. 236). Every month respondent issues a catalogue which includes the newly issued patterns and omits those withdrawn as outmoded, so that the number of patterns in the catalogue remains about constant (R. 199). The catalogue is essential to sale at retail (R. 22). A purchaser looks through the catalogue to select the pattern or patterns wanted and the sales clerk takes from stock the ones chosen (R. 58, 75, 136). Respondent also supplies to retailers (normally with the initial stock of patterns) steel cabinets specially designed for storing the patterns and displaying the catalogues (R. 202).

[1] Vogue, McCall, Butterick, and Advance Patterns (R. 58, 205).

[2] The smaller share of the business dollarwise is because respondent's patterns are among the lowest priced patterns (R. 233).

The fabric stores pay respondent $2.00 or $2.50 for each new catalogue; pay (by purchase or rental) for the cabinets; pay in full for their stocks of patterns;[3] and pay the cost of transportation on all patterns, catalogues, and cabinets shipped from respondent (R. 37, 43–4, 83, 88, 127, 159–60, 234, 316). In sales to ten cent stores, respondent's practices are radically different: it furnishes catalogues and cabinets free; pays all transportation costs; and does not require payment for the patterns carried in stock (R. 62–3, 208).

The free services and facilities thus furnished ten cent store chains are substantial in value. As to four ten cent store chains, the catalogues which respondent furnished free in 1954 were valued at $128,904; the cabinets furnished free which they had on hand at the end of 1954 were valued at over $500,000; and their inventory of respondent's patterns at the end of 1954 was valued at more than $1,775,000, each of these values being based on respondent's usual sales price.[4] Respondent's president testified that it would cost over $2,000,000 annually to give its other customers (representing about 75% of its sales, R. 312, 314) the free transportation, free catalogues, and free cabinets furnished to ten cent stores (R. 234, 235).[5]

Respondent's operations in selling to ten cent stores

[3] Respondent permits some fabric stores to purchase patterns on credit, but charges them 5% interest on the amount owed (R. 275, 279, 280).

[4] Totals (excluding Sears Roebuck) of columns b, g, and h, of Commission Ex. 44–B, R. 313, as explained at R. 315.

[5] That figure does not include the cost of interest-free financing of inventories, a further benefit given the ten cent stores.

and to fabric stores are substantially the same, both in the distributive steps involved and in sales volume per retail outlet. Each individual store in a ten cent store chain orders and reorders patterns directly from respondent, and respondent ships the orders direct to the individual store (R. 63, 73).[6] Ten cent stores often have a lower sales volume per store than fabric stores. In the Washington, D.C. area, the 1954 sales of respondent's patterns by 33 ten cent stores were $16,805, or $509 per store, while the 1954 sales of 48 fabric stores were $27,365, or $570 per store (R. 212–3).[7]

Ten cent stores expect to make a profit on the sale of respondent's patterns and would not handle them if they did not independently return a profit (R. 22). Fabric stores, on the other hand, ordinarily make no profit, as the business is now conducted, on the sale of dress patterns (R. 23). They handle respondent's patterns, and frequently also patterns of its competitors, because many of their customers expect to look at patterns before purchasing fabrics for making clothing; availability of suitable patterns in the stores promotes their fabric sales (*ibid.*).

2. On respondent's motion to dismiss both counts of the complaint, made at the close of the Commission's evidence, the hearing examiner ruled that the evidence

[6] Payment for patterns purchased by stores in the Woolworth chain is made from one of its 11 district offices (R. 73), but respondent, to verify these payments, would have to check them against the orders received from individual stores.

[7] Respondent's president testified that the sales in the Washington area were substantially representative of respondent's national sales (R. 213–4).

showed a violation of § 2(e) of the Clayton Act, and denied the motion as to Count II (R. 292–3, 297). In a subsequent colloquy with counsel, the examiner stated that, as he construed the statute, the cost-saving proviso attached to the prohibition against price discrimination in § 2(a) did not apply to the prohibition in § 2(e) against discrimination in the furnishing of services and facilities, and that he would, upon objection, exclude any evidence offered by respondent to show "cost justification of the value of the services and facilities" furnished ten cent stores (R. 298, 302, 304–5). Respondent's counsel stated that, under these circumstances, respondent would offer no evidence (R. 305).

The examiner found that ten cent stores and fabric stores "are in competition in the sale of respondent's patterns"; that no showing of "competitive injury" was required; and that respondent had violated § 2(e) by furnishing free catalogues and cabinets to the ten cent stores but not to the fabric stores (R. 22–23). The Commission adopted the examiner's findings as its own (R. 31), and stated in its opinion that § 2(e) is not to be read as permitting "introduction of evidence relating to cost justification" (R. 30). The order which the Commission entered (adopting the order proposed by the examiner) requires respondent to cease and desist from furnishing any of its customers with catalogues, cabinets, or other facilities unless such facilities "are available on proportionally equal terms to all customers competing with such favored customers in the sale of respondent's patterns" (R. 25, 31).

The court of appeals upheld the Commission's findings that respondent had discriminated among its purchasers in the furnishing of services and facilities, and that the favored purchasers and those discriminated against competed with each other in the sale of respondent's patterns (R. 331–2). On the latter point the court said (R. 332):

> We agree that the [ten cent stores] and the fabric stores, operating in the same cities and in the same shopping area, often side by side, were competitors, purchasing from Simplicity at the same price and then at like prices retailing the identical product to substantially the same segment of the public.

A majority of the court (Judges Danaher and Washington) also agreed with the Commission that "Section 2(e) was written for the promotion of fair dealing among the customers of a seller" and that injury to competition is not "an element of a § 2(e) violation" (R. 333).[8] However, a different majority of the court (Judges Danaher and Burger) concluded that, under § 2(b) of the Act, a seller may "dispel" a § 2(e) charge by showing that its lower costs, in sales to the favored class of purchasers, equalled the value of the facilities or services furnished to them and denied to others (R. 333–6, 338–41). Accordingly, the court set aside the Commission's order and remanded the case for further proceedings for the receipt of respondent's "cost justification" evidence.

Judge Washington, dissenting, was of the view that the cost-justification defense is "available in a case

[8] Judge Burger disagreed with this conclusion. See footnote 13 to the court's opinion (R. 339).

brought under Section 2(a), but not in one brought under Section 2(e)" (R. 344). He stated: "The 'justification' referred to in Section 2(b) must be that described in the meeting-competition proviso to that section, or such justification as may be spelled out from the provisions of the particular section—other than Section 2(b)—creating the offense alleged" (R. 343). He pointed out that no one claimed that the § 2(b) proviso was applicable to the present case, and that the only justification which § 2(e) itself permits is a showing by the seller "that in fact the facilities furnished were accorded to all purchasers on proportionally equal terms" (R. 343–4).

SUMMARY OF ARGUMENT

1. Section 2(e) of the Clayton Act forbids, without qualification, the furnishing of services or facilities to one purchaser "upon terms not accorded to all purchasers on proportionally equal terms." No exception is made to permit the furnishing of facilities the value of which does not exceed the seller's cost savings in sales to the favored purchaser, and no such "cost-justification" defense can be read into the terms of § 2(e). Section 2(a) of the Act, which forbids discrimination in price among purchasers, contains a proviso expressly authorizing price differentials when justified by cost differences, but it is clear, as the court of appeals held, that that proviso is applicable only to § 2(a) and does not qualify the absolute prohibitions of the other subsections of § 2.

The court of appeals, although agreeing that the § 2(a) proviso is inapplicable to § 2(e) and that

§ 2(e) itself provides no exception for cost-justified discrimination, held that § 2(b) of the Act creates an independent defense of "justification" for any practices that might otherwise violate §§ 2(a), 2(d), or 2(e). Although recognizing that the Act nowhere defines "justification"—apart from the affirmative defenses expressly authorized in the substantive provisions of the section (and the proviso to § 2(b))—the court held the term was broad enough to include the defense that the discrimination reflected only cost savings in dealing with the favored purchaser.

That interpretation of § 2(b) is unsupportable. That section provides that upon proof being made of discrimination in price or services and facilities, "the burden of rebutting the prima-facie case thus made by showing justification shall be upon" the person charged with the violation. Patently the provision is no more than a procedural direction establishing the burden of proof on defenses otherwise recognized and does not itself create substantive defenses. *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 75.

That reading of § 2(b) is confirmed by its legislative history. In addition to its procedural provisions, § 2(b) contains a proviso permitting discrimination by a seller when necessary to meet competition. As originally reported, the proviso authorized only *price* discrimination in meeting competition. Likewise, the burden-of-proof provisions, as originally reported, applied only to proceedings involving discriminations in price, since at that time the only affirmative defenses provided for were those applicable to price

discrimination (the provisos to §§ 2(a) and 2(b)). On the floor of the House, however, the proviso to § 2(b) was amended so as to permit discrimination in services or facilities (as well as in price) in order to meet competition. The same amendment also modified the first part of § 2(b) to extend the burden-of-proof provision to cover cases involving discrimination in services or facilities. The whole amendment was explained to the House as simply permitting "a seller to meet * * * competition in services and facilities furnished" (80 Cong. Rec. 8225). That was clearly its only purpose, and the amendment to the procedural provisions did no more than recognize the new substantive defense to § 2(e) charges created by the amended proviso.

2. The decision below is also inconsistent with the uniform judicial construction of the several subsections of § 2 in analogous situations. While § 2(a) prohibits only those discriminations in price which may injure competition, the courts have uniformly held that no competitive injury need be proved to establish illegal discrimination in services or facilities in violation of § 2(e) (*e.g., Elizabeth Arden, Inc.* v. *FTC*, 156 F. 2d 132, 135 (C.A. 2), certiorari denied, 331 U.S. 806) or illegal brokerage fees in violation of § 2(c) (*e.g., Biddle Purchasing Co.*, v. *FTC*, 96 F. 2d 687, 690 (C.A. 2), certiorari denied, 305 U.S. 634). There seems no relevant distinction in this respect between the competitive-injury limitation of § 2(a) and the cost-justification defense provided for in that section, and the reasons for not reading the former into the other subsections equally apply to the latter. The two

questions were, indeed, treated as identical in *Great Atlantic & Pacific Tea Co.* v. *FTC*, 106 F. 2d 667 (C.A. 3), holding that neither the competitive-injury limitation nor the cost-justification defense of § 2(a) are applicable to the prohibition of brokerage fees in § 2(c).

Nor is it anomalous to permit the seller's lower cost as a justification for price discrimination but not as a justification for discrimination in services or facilities. The distinction is justified in order to require variance in treatment of different purchasers to be brought out in the open, in the form of readily measurable price differentials, rather than be disguised in variations of services and facilities furnished.

ARGUMENT

I

IT IS CLEAR FROM THE FACE OF THE STATUTE AND ITS LEGISLATIVE HISTORY THAT COST JUSTIFICATION IS NOT A DEFENSE TO A CHARGE OF DISCRIMINATION IN FURNISHING SERVICES OR FACILITIES TO PURCHASERS IN VIOLATION OF SECTION 2(e) OF THE CLAYTON ACT

Section 2(e) of the Clayton Act makes it "unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale * * * by * * * the furnishing of, any services or facilities * * * upon terms not accorded to all purchasers on proportionally equal terms." It is clear, as the court below held, that respondent's furnishing of free catalogues and cabinets to ten cent stores but not to fabric stores constituted, prima facie at least, a violation of that section.

The question is whether "cost justification" is a defense to such an alleged violation—*i.e.*, whether respondent may defend the charge against it by showing that the value of the services and facilities given the ten cent stores did not exceed its cost savings on sales to such stores. In terms, § 2(e) forbids all such discrimination, whether cost-justified or not, and it is our view that no such defense can be read into the section, whether by virtue of (1) the cost-justification proviso of § 2(a); (2) an interpretation of § 2(e) itself; or (3) by inference from the procedural provisions of § 2(b).

A. THE COST-JUSTIFICATION PROVISO OF SECTION 2(a) IS INAPPLICABLE TO SECTION 2(e)

Section 2(e) is one of four subsections of § 2 containing substantive prohibitions of selling practices: § 2(a) prohibits discrimination in price between different purchasers; § 2(c) prohibits payment of brokerage to a purchaser or his agent; § 2(d) prohibits payment to a customer for services or facilities furnished by him without making a proportionally equal payment available to other customers; and § 2(e) prohibits furnishing to a purchaser services or facilities not accorded to all other purchasers on proportionally equal terms.[9] While obviously closely related in basic purpose, each of these subsections sets forth

[9] Section 2(f), although also a substantive prohibition, merely outlaws the knowing *receipt* of a price discrimination the *giving* of which is otherwise prohibited by § 2(a). To that extent § 2(f) is necessarily subject to the defenses available under § 2(a). See *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 70–71.

a separate and distinct prohibition; each prohibition is independently defined and each definition contains different elements.

Section 2(a), in particular, is subject to limitations significantly absent from the other subsections. It prohibits price discrimination only "where the effect of such discrimination may be substantially" to injure competition. None of the other subsections is so qualified. In addition, a proviso to § 2(a) expressly provides that "nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered," subject, however, to the power of the Commission to establish quantity limits beyond which further differentials are not permitted. Again, the other subsections contain no equivalent provision.

From the structural independence of the several subsections of § 2, we think it clear, and the court of appeals agreed (R. 338), that the cost-justification proviso of § 2(a) provides a defense only to the prohibition contained in that subsection (price discrimination) and cannot apply, of its own force, to any of the other subsections. Respondent contended in the court below that the proviso was not limited in application to § 2(a) because it refers to justified "differentials" rather than to "price differentials." In its context, however—in a proviso to a prohibition of *price* discrimination—the meaning of "differential" is clear. The committee reports, moreover, ex-

plained the meaning of the proviso entirely in terms of price differentials and nowhere suggested that it had any broader scope. Thus the House Committee report stated that the proviso[10] "limits the use of quantity price differentials to the sphere of actual cost differences", and that it "limits the differences in cost which may justify price differentials". H. Rep. 2287, 74th Cong., 2d Sess., pp. 9, 10. The Senate Committee report said that the proviso "limits the use of quantity price differences", and that it limits "the differences in cost which may be honored in support of price differentials". Sen. Rep. 1502, 74th Cong., 2d Sess., p. 5.

B. SECTION 2(e) DOES NOT ITSELF IMPLIEDLY EXEMPT COST-JUSTIFIED DISCRIMINATION

The specification of a cost-justification defense in § 2(a) and its omission from the other subsections of § 2 in itself precludes, we submit, finding such a limitation to be implicit in the other subsections. In any

[10] The proviso, as reported by the House Judiciary Committee, read (H. Rep. 2287, 74th Cong. 2d Sess., p. 2):

> That nothing herein contained shall prevent or require differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *.

The proviso, as reported by the Senate Judiciary Committee, read (Sen. Rep. 1502, 74th Cong., 2d Sess. p. 1):

> That nothing herein contained shall prevent * * * differentials which make only due allowance for differences in the cost, other than brokerage, of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *.

event, there is no language in § 2(e) from which an exemption for cost-justified discrimination could be inferred. Distinguishing between purchasers on the basis of cost savings to the seller, furnishing facilities to some but not to others, cannot be said to be furnishing facilities "to all purchasers on proportionally equal terms." That phrase relates, not to equality in the seller's cost of sale, but to equality in the contribution made by the purchaser as an outlet for the seller's goods, measured by sales volume or some other uniform measure of his contribution. As the committee reports on the sections of the bill which corresponded to present §§ 2(d) and 2(e) explained (H. Rep. 2287, 74th Cong., 2d Sess., p. 16; Sen. Rep. 1502, 74th Cong., 2d Sess., p. 8):

> The phrase "proportionally equal terms" is designed to prevent the limitation of such allowances to single customers on the ground that they alone can furnish the services or facilities or other consideration in the *quantities specified.* Where a competitor can furnish them *in less quantity,* but of the same relative value, he seems entitled, and this clause is designed to accord him, the right to a similar allowance commensurate with those facilities. [Emphasis supplied.]

Moreover, to interpret the "equal terms" requirement of § 2(e) as being satisfied if the discrimination is cost-justified would create a cost-justification defense to § 2(e) much broader in scope than that expressly provided for in § 2(a). In allowing cost-justification as a defense to § 2(a), Congress guarded against cost-justified differentials which would be

"unjustly discriminatory or promotive of monopoly" by empowering the Commission to establish quantity limits beyond which additional discounts may not be allowed (§ 2(a), second proviso). Were a cost-justification defense read into § 2(e), no such limitation would be applicable. Hence the limitation in § 2(a) on cost-justified price differentials could be avoided by granting further cost-justified preferences in the form of services or facilities rather than further price reductions.

C. A DEFENSE OF COST JUSTIFICATION CANNOT BE INFERRED FROM THE PROCEDURAL PROVISIONS OF SECTION 2(b)

In upholding respondent's claim to a cost-justification defense, the court of appeals relied neither upon the proviso to § 2(a) nor upon an interpretation of § 2(e) itself. Rather it found the existence of such a defense to be implicit in the procedural provisions of § 2(b). Section 2(b) provides in part:

> Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided,* * * *.

The proviso provides that a seller may rebut the prima facie case by showing that he offered the prices or furnished the services or facilities to meet those offered or furnished by a competitor.

The proviso to § 2(b) clearly creates a meeting-competition defense to §§ 2(d) and 2(e) as well as to § 2(a). Thus, in providing, in the first part of § 2(b), that the burden of proving affirmative defenses should be upon the defendant, it was necessary to refer to proceedings under those subsections (discrimination in services or facilities) as well as to proceedings under § 2(a) (discrimination in price), and the reference to § 2(e) proceedings in the first part of the section plainly has no other significance.

The court of appeals, however, interpreted the provision of § 2(b) requiring that "justification" be affirmatively shown as itself creating a substantive defense of "justification," in effect limiting the scope of §§ 2(a), 2(d), and 2(e) to only "unjustified" discrimination. Since, as the court of appeals recognized (R. 338), the Act in no way defines "justification," that interpretation leaves to the courts the evolution, on a case-by-case basis, of new standards of "justification" for conduct which would otherwise violate the provisions of § 2. In this case, the court held simply, without limiting the general scope of the defense of "justification," that it includes the giving of discriminatory advantages which do not exceed in value the seller's cost savings in selling to the favored purchaser.

That interpretation of § 2(b) is, we submit, untenable. On its face, the first portion of the section (*i.e.*, before from the meeting-competition proviso) is, as this Court has observed, "procedural" and merely "attempts to lay down the rules of evidence

under the Act". *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 75 and n. 17. In terms, it does no more than allocate the burden of proof for affirmative defenses elsewhere created and is simply declaratory of "the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *FTC v. Morton Salt Co.*, 334 U.S. 37, 44–45.

The court's interpretation of the first part of § 2(b) as creating a new substantive defense would also make the cost-justification proviso of § 2(a) surplusage and would, as noted above (pp. 15–16), afford a cost-justification defense to §§ 2(d) and 2(e) much broader in scope than the limited defense expressly provided for in § 2(a). Moreover, if § 2(b) were intended to give the courts a general warrant to exempt from the several prohibitions any conduct which they deem "justified," there seems little reason why § 2(b) should not have been extended to include proceedings under § 2(c) (brokerage payments). The explanation is simple, however, if § 2(b) is read as being only procedural: § 2(c) is the only one of the four substantive prohibitions to which no affirmative defense at all is expressly provided, making a provision for the burden of proof in such proceedings unnecessary.

Finally, the legislative history of § 2(b) shows conclusively that it was intended not to create substantive defenses (other than in the meeting-competition proviso) but only to prescribe the burden of proof for defenses otherwise authorized. In a 15-page discussion of the bill, the House Judiciary Committee report devoted but a single sentence to what became

§ 2(b)[11] (H. Rep. 2287, 74th Cong., 2d Sess., p. 16):

> Section [(b)] down to the proviso merely lays down directions with reference to procedure including a statement with respect to burden of proof.

As thus reported, the section, both in its initial part and in the proviso, referred solely to "discrimination in price" (*id.* at p. 2). The section was expanded so as to include, in both parts, discrimination in furnishing services or facilities by a committee amendment proposed on the floor of the House. The amendment was adopted without debate after the following statement made by Congressman McLaughlin on behalf of the House Judiciary Committee (80 Cong. Rec. 8225):

> Mr. Chairman, this is a committee amendment agreed to unanimously by the committee and was explained yesterday.[12] It simply allows a seller to meet not only competition in price of other competitors but also competition in services and facilities furnished.

This history clearly shows that the first part of § 2(b) was intended solely to allocate the burden of proof on defenses otherwise authorized. It was originally limited in application to § 2(a) proceedings because no such defenses were provided for in the other subsections.[13] It was only when the meeting-

[11] Section 2(e) of the bill as reported.

[12] During the preceding day's discussion of the bill, the committee's proposed amendment of the section was referred to and the text of the amendment was given (80 Cong. Rec. 8106, 8140), but we do not find that it was then "explained".

[13] The absence of any burden-of-proof provision applicable to proceedings under §§ 2(d) and 2(e), prior to the extension of

competition defense in the § 2(b) proviso was extended to discriminations in furnishing services and facilities that it became necessary to expand the burden-of-proof provision to include such proceedings. The fact that the Committee amendment to include discrimination in services and facilities in § 2(b) was presented to Congress solely in terms of extending the meeting-competition defense to such discrimination shows that this was the only substantive change intended and is inconsistent with the view that the burden-of-proof rule declared in the section generates any substantive defense. Both from the language of § 2(b) and its history, therefore, it is clear that there is no basis for reading the first part of § 2(b) as itself creating a substantive defense.

II

THE DECISION BELOW IS INCONSISTENT WITH THE UNIFORM JUDICIAL CONSTRUCTION OF THE ACT

The holding below that cost saving is a defense to a charge of violation of § 2(e) is inconsistent with the uniform judicial construction of the provisions of § 2 in analogous situations. The prohibition of price discrimination in § 2(a) is subject not only to the defenses permitted by the § 2(a) provisos but also to the limitation that the discrimination tends to injure

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the meeting-competition defense to such cases, also reinforces the conclusion, urged above (pp. 12–16), that a cost-justification defense cannot be read into § 2(e) either from its own terms or by extension of the § 2(a) proviso. Had it been thought that cost-justification was a defense in § 2(e) proceedings, it would have been necessary to provide for the burden of proof in such cases even before the creation of the meeting-competition defense.

competition. No proviso and no such limitation are attached to the prohibitions of §§ 2(c), 2(d), and 2(e). It has been repeatedly held that the injury-to-competition limitation of § 2(a) is not to be read into either the § 2(c) prohibition [14] or the § 2(e) prohibition.[15] And the grounds which have led the courts so to hold are equally grounds for not reading into these prohibitions the § 2(a) provisos. Indeed, in *Great Atlantic & Pacific Tea Co.* v. *FTC*, 106 F. 2d 667 (C.A. 3), where the court held that neither the cost-saving proviso nor the injury-to-competition limitation of § 2(a) was to be read into the § 2(c) prohibition, the court treated the question of reading in the proviso as presenting the "precise question" presented by reading in the injury-to-competition limitation (*id.* at 676). The court summarized its conclusion, both as to the cost-saving proviso of § 2(a) and its injury-to-competition limitation, as follows (*id.* at 677):

> In other words, paragraph (c) constitutes a specific prohibition of a specific act and the acts committed by the petitioner are within such prohibition. To read the words of paragraph (a) into paragraph (c) destroys the Congressional intent.

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[14] *Biddle Purchasing Co.* v. *FTC*, 96 F. 2d 687, 690 (C.A. 2), certiorari denied, 305 U.S. 634; *Oliver Bros., Inc.* v. *FTC*, 102 F. 2d 763, 766, 767 (C.A. 4); *Great Atlantic & Pacific Tea Co.* v. *FTC*, 106 F. 2d 667, 676–677 (C.A. 3), certiorari denied, 308 U.S. 625; *Webb-Crawford Co.* v. *FTC*, 109 F. 2d 268, 269 (C.A. 5), certiorari denied, 310 U.S. 638.

[15] *Elizabeth Arden, Inc.* v. *FTC*, 156 F. 2d 132, 135 (C.A. 2), certiorari denied, 331 U.S. 806; *Corn Products Refining Co.* v. *FTC*, 144 F. 2d 211, 219 (C.A. 7), affirmed, 324 U.S. 726.

Oliver Bros., Inc. v. *FTC*, 102 F. 2d 763 (C.A. 4), aptly states the reasons for applying §§ 2(c), 2(d), and 2(e) as they are written, namely as outright prohibitions, and not as being subject to limitations or defenses incorporated into § 2(a). The court said (p. 767):

> * * * three specific matters were forbidden as unfair trade practices by subsections (c),(d) and (e) * * *. It is perfectly clear that all three of these practices were forbidden because of their tendency to lessen competition and create monopoly, without regard to their effect in a particular case; and there is no reason to read into the sections forbidding them the limitations contained in section 2(a) having relation to price discrimination, which is an extremely difficult matter to deal with and is condemned as unfair only in those cases where it has an effect in suppressing competition or in tending to create monopoly. The forbidding of specific practices because of their tendency toward a general result, also forbidden, is familiar legislative practice; and no reason suggests itself why the limitations and provisions relating to one should be read into those relating to the other.

Nor is it anomalous to permit the seller's lower cost as a justification for price discrimination but not as a justification for discrimination in services or facilities. If the seller's cost of manufacture, sale, or delivery is lower in sales to a particular purchaser or purchasers by reason of differing quantities sold or differing methods of sale or delivery, it is appropriate

for him to translate his lower cost into a lower price. Then, if he is proceeded against under § 2(a), he can rebut the prima facie case of price discrimination by proving his lower cost. But paying brokerage to the buyer, or furnishing to him facilities not accorded in like measure to all other buyers, is discrimination cloaked as a legitimate business transaction. Congress denominated practices of this kind as "abuses",[16] and accordingly outlawed them. The outright prohibitions were designed to bring variance in treatment of different purchasers into the open, as price differentials, which could be proceeded against, if at all, under the carefully framed provisos and limitations of § 2(a). In *Biddle Purchasing Co.* v. *FTC*, 96 F. 2d 687, 692 (C.A. 2), the court said:

> Congress may have had in mind that one of the principal evils inherent in the payment of brokerage fees by the seller to the buyer directly or through an intermediary, is the fact that this practice makes it possible for the seller to discriminate in price without seeming to do so. * * * One of the main objectives of section 2(c) was to force price discriminations out into the open where they would be subject to the scrutiny of those interested, particularly competing buyers.

[16] The House Judiciary Committee report on the bill said that the subsection which is now 2(c) deals with "the abuse of the brokerage function" (H. Rep. 2287, 74th Cong., 2d Sess., p. 14), and the Conference Report on the bill states that the subsections which are now 2(d) and 2(e) deal with "the major types of abuses" in furnishing or paying for advertising, services, and facilities (H. Rep. 2951, 74th Cong., 2d Sess., p. 7).

CONCLUSION

It is respectfully submitted that the judgment of the court of appeals should be reversed, with directions to affirm the Federal Trade Commission's order.

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APPENDIX

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13:

(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on

account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prime-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or dis-

count in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) That it shall be lawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

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